



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 23 OF 2015

JOSEPH KROP TERER alias

KIROP TOMOKWANG.....1ST PLAINTIFF

HUDSON PKANAN TERER alias

KAMAN TOMOKWANGI.....2ND PLAINTIFF

PETER KILEKAMAR alias

NAWIY TOMOKWANG.....3RD PLAINTIFF

VERSUS

BENSON KONG'OLEKWANG.....DEFENDANT

JUDGMENT

1. By a plaint dated 2/3/2015 and filed in court on 3/3/2015 the plaintiffs sought the following orders against the defendant:-

- (a) A declaration that the plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as West Pokot/Kisaunet/147 ("the suit property") which the defendant whether by himself or his servants or agents or otherwise is wrongfully in occupation and is accordingly, a trespasser thereon and is not entitled to remain on the suit property.
- (b) A vacant possession of the suit property.
- (c) General damages for trespass.
- (d) Costs of this suit together with interest thereon.
- (e) Any such other or further relief as this honourable court may deem appropriate.

2. According to the plaint the plaintiffs are the bona fide proprietors and beneficial owners of land reference number **West Pokot/Kisaunet/147** measuring **37.0 hectares** situate in West Pokot County. They have had full possession of the suit land. However while they were in such possession the defendant wrongfully entered and took possession of the suit property and has remained in possession since thus leading to constant confrontation between the plaintiffs and the defendant. It is alleged that the defendant is in the process of erecting development of a permanent nature on the suit property without the plaintiffs' consent. The plaintiff alleged that they have suffered loss and damage from the defendant's acts of trespass including deprivation of use and quiet possession of the property, environmental degradation on the property and erection of structures that deface its aesthetic beauty hence this suit.

The Defendant's Defence and Counterclaim

3. The defendant entered appearance and filed defence and counterclaim dated **19/6/2015**. According to the defendant it is not in dispute that the plaintiffs are currently the registered proprietor of the suit property but he contends that the land was purchased by his father Longolepus Yarangole from one Losiakou Tongokwiang the brother to the plaintiffs in 1978. He avers that after purchase of the land by his father his family assumed occupation and they had been living thereon without any interruption or objection from the plaintiffs since 1978. He avers that the plaintiffs live in other places far from the suit land.

4. In his counterclaim, the defendant reiterate the contents of the plaint and maintains that he has acquired proprietary rights to the suit land by way of adverse possession.

5. The defendant prays that the plaintiffs' claim be dismissed with costs and judgment be entered in favour of the defendant for:-

(i) **An order of adverse possession and the suit property be registered in the name of the defendant.**

(ii) **An order of permanent injunction restraining the plaintiffs from interfering with defendant quiet possession.**

(iii) **Costs and interest of this suit.**

The Plaintiff's Reply to Defence and Counterclaim

6. In his reply to defence and defence to counter claim filed on **21/7/2015** the plaintiff join issues with the defendant on the matters contained in the defence and reiterates the contents of the plaint. In particular they denied that the land was sold to the defendant's father by Longolepus Yarangole from one Losiakou Tongokwiang. On the basis of the foregoing, their prayer is for this court to dismiss the defence and counterclaim with costs and the judgment sought in the plaint entered.

The Plaintiff's Evidence

7. The suit came up for hearing on **19/3/2018**. The 1st plaintiff **Joseph Krop Terer alias Kirop Tomokwang** gave evidence on his own behalf and on behalf of other plaintiffs. He reiterated the matters in the plaint and the reply to defence and counterclaim. He identified the 2nd - 4th plaintiff as his brothers. He averred that the defendant lives on the suit land; that title was issued in 1979 in the names of the plaintiffs and produced the title as **P. Exhibit 1**. He also produced payment receipt as **P. Exhibit 3** and a demand letter as **P. Exhibit 4**. He denied the land had been sold to the defendant's father. He prayed for defendant's claim for adverse possession be dismissed.

8. Upon cross-examination by Ms. Chebet he admitted that the defendant and his father entered on the suit land in 1980 and that they have been conducting farming activities on a portion of the land since then. They also graze their animals on the land. However, save for the spot where he grows crops the defendant has not fenced the rest of the land. He also admitted that the plaintiffs do not live on the land. He alleged that he and his brothers were born on the land but they were removed on the land in 1979 to which they have never returned. He does not have any evidence that they have ever tried to remove the defendant from the suit land. Upon re-examination by Mr. Ingosi he admitted that the defendant utilizes the entire land. With that evidence on the record the plaintiffs closed their case.

The Defendant's Evidence

9. **DW1, Benson Long'olekwang** the defendant gave evidence on **30/10/2018**. His evidence is that he lives on the suit land which was bought by his father Losiakou Tongokwiang in 1978. Losiakou was the defendant's uncle, that is brother to his father. Longolepus Yarangole then built a home on the land and lived there. Upon his demise he was buried on the land. He was not given title as it had not been surveyed though he started the process of acquisition of the title he died before the process was complete. He produced **D. Exhibit 1** a letter from his father to the Land Adjudication Officer West Pokot in respect of the suit land informing the office that the land was Losiakou that he had bought the land for Kshs.2000/= and that he should be given either the land or be refunded the money plus interest. It would appear that while that letter was being written, no title had been issued to the plaintiffs as the letter is dated **6/2/1979** and subsequently on **19/11/1979** the plaintiffs were registered as proprietors of the suit land. He avers that the plaintiffs have never lived or worked on the suit land and that he has been in occupation thereof for 37 years and prays the court to dismiss the plaintiffs' claim and order that he is the owner of the suit land by virtue of adverse possession.

10. Upon cross-examination by Mr. Ingosi he admitted that there was opposition to the sale though he could not point out exactly who was opposed to the sale however, he confirmed that since 1979 there has never been any quarrel regarding the land. When further pressed he admitted he was not yet born by 1979. He avers that his father was not refunded the money and that he lived on the land under the auspices of his father's claim to the land.

11. **DW2 Nguriakapel Longolng'ole** testified on **12/2/2019**. He testified that the defendant is his neighbour; that the land was sold to the defendant's father Losiakou Tongokwiang for Kshs.2000/=; that he witnessed the purchase of the land; that Longolepus took possession thereof and conducted animal husbandry; that all his children were born on the land and that he does not know the plaintiffs who according to him have never lived on the land; that he is also not aware of any dispute between the plaintiffs and the defendant or between the plaintiffs and the defendant's father. However, he knew of the dispute between Lokir Tomokwang and Longolepus which ended in 1979. After that dispute Lokir did not take possession of the land. In his view the land belongs to the defendant's father. He confirms that the plaintiffs do not live within the vicinity of the land. However the witness statement of this witness is in doubt because upon cross-examination he asserted that he executes documents by way of thumb printing and he appeared not to own up to the signature which was effected by pen on his purported statement.

Submissions

12. The plaintiffs filed written submissions on **13/3/2019** and the defendant on **25/3/2019**.

13. I have considered those submissions.

DETERMINATION

The issues for determination

(1) Should the defendant be declared proprietor of the suit property by virtue of adverse possession

(2) What orders should issue?

(1) Should the defendant be declared proprietor of the suit property by virtue of adverse possession.

14. The plaintiffs have proved that they are the registered owners of the suit property. PW1 also produced P. Exhibit 4 a demand letter dated 25/8/2014. In that letter and in the plaint, the plaintiffs have skirted around the issue of when the defendant is said to have entered into wrongful occupation of the suit property. The defendant's defence is that he has been on the suit property since he was born and that the plaintiffs have never lived on the suit property. The oral evidence of DW2 corroborate that fact. The defendant's evidence places the last date on which a dispute concerning the suit property was witnessed as the year 1979. By that time the suit property had not been issued a title. The dispute is alleged to have arisen at a time when his father is alleged to have been in the process of purchasing the land from the plaintiffs' uncle whereupon some members of the plaintiffs' father's family objected to the sale. Exhibit 1 is testament to the fact that such a dispute existed and in that exhibit the defendant's father is seen to be demanding to be given either the land or a refund of the purchase he had paid for it. PW1 confirmed that he had at one time learnt of the sale of suit land. However, the plaintiff's contends that since the defendant's occupation began by way of a sale agreement, the doctrine adverse possession cannot apply. He cites the case of **Mungania -vs- Imanyara [1985] eKLR**. The defendant on the other hand relies on provision of Section 7 of the Limitation of Actions Act which in his view, bars the plaintiffs from recovery of the land 12 years from the date of which the cause of action accrues. The defendant cited the case of **Gulam Miriam Nurdin -vs- Julius Charo Karisa [2015] eKLR** for the proposition that time began to run against the appellant in title in favour of the respondent from the time the respondent occupied the suit property and engaged in acts inconsistent with the appellant title.

15. I am convinced by the evidence on the record that the defendant's father occupied the land in the year 1979. If there was any evidence that he did not do so after D. Exhibit 1 was written, it would be in the hands of the plaintiffs to produce in this suit. What I must then consider is:

(1) Whether under the provision of Section 7 of the Limitation of Actions Act the plaintiffs are barred from recovery of the suit land.

(2) Whether there was peaceful uninterrupted and without secrecy possession that is *nec per vim, nec clam, nec precario* to warrant and order declaration the plaintiff as entitled to the suit land by virtue of adverse possession.

16. The plaintiffs were registered as proprietors on 19/11/1979. 12 years thereafter that is by 1982 they had not recovered possession of the suit land from the defendant's father or the defendant. It can not be gain said that the plaintiffs waited too long to institute this suit and I agree with the defendant that they are caught up by doctrine of limitation which is embodied in **Section 7** of the Limitation of Actions Act.

17. As regards whether there was peaceful uninterrupted and possession without secrecy that is *nec per vim, nec clam, nec precario* on the part of the defendant to warrant a declaration that the defendant is entitled to the suit land by virtue of adverse possession I must consider that the disposal of the previous issue regarding the period of occupation has already determined part of this issue; 12 years have passed. Ordinarily, one is entitled to apply for a declaration that they are so entitled under that doctrine after 12 years. The only issues that I must now examine; are whether there was peaceful, open and uninterrupted possession of the suit land on the part of the defendant. In my view evidence places the last dispute between the parties and those claiming under them to be the year 1979. No evidence of attempted eviction or indeed any interruption of possession on the part of the defendant has been brought to the attention of the court in this suit by the plaintiffs. It is my conclusion that the defendant is entitled to be registered as the proprietor of the suit land by virtue of adverse possession.

(c) What orders should issue?

18. Consequently I find that plaintiffs have failed to establish their claim against the defendant on a balance of probabilities while the defendant has proved his counterclaim against the plaintiff on the balance of probabilities. I therefore dismiss the plaintiffs' claim and enter judgment for the defendant on his counterclaim and I order as follows:

(1) The plaintiffs' suit is dismissed with costs.

(2) The defendant's counterclaim succeed.

(3) A declaration that the defendant is entitled to be registered as the proprietor of the suit land by virtue of the doctrine of adverse possession.

(4) An order directing the cancellation of the title in the names of the plaintiffs and registration of the defendant as the proprietor of the suit land.

(5) An order of permanent injunction restraining the plaintiffs from interfering with the defendant's quiet possession of the suit land.

(6) The plaintiff shall bear the costs of both the suit and the counterclaim.

Dated, signed and delivered at Kitale on this 18th day of July, 2019.

MWANGI NJOROGE

JUDGE

18/7/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Bett holding brief for Ingosi for Plaintiff

Ms. Mufutu holding brief for Chebet for Defendant

N/A for 2nd defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

18/7/2019